IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 2 OF 2002.

Smt. Filomena Pereira,
r/o H. No. 573, Kevon,
Raia, Salcete Goa. ... Petitioner.

Versus

1. State (through Public Prosecutor).
2. Shri Filipe Fernandes,
r/o H. No. 574, Kevon,
Raia, Salcete Goa. ... Respondents.

Mr. F.M. Tavora, Advocate for the Petitioner.

Mr. V.P. Thali, Addl. Advocate General with Miss S. Linhares, Addl. Govt. Advocate for the Resp. No. 1.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Respondent No. 2.

Coram: P.V. HARDAS, J.

Date: 8th March 2002.

ORAL JUDGMENT.

By consent of parties, this Revision is heard finally at the stage of admission.

2. This is a revision against the Judgment of the District and Sessions Judge, South Goa, Margao, by which the Order, dated 15th March 2001, passed by the Executive Magistrate of Salcete, Margao, Goa, on the application under Section 133 of the Code of Criminal Procedure complaining that the coconut tree belonging to the present respondent no. 2, which was leaning over the kitchen of the present petitioner, was likely to fall and cause damage, was set aside. The learned Executive Magistrate of Salcete, Margao, by his Order dated 15th March 2001 allowed the aforesaid application and confirmed the conditional Order which was passed on

23rd September 1997. The aforesaid Order directed the present respondent no. 2 to cut the coconut tree within 8 days of the receipt of the Order.

3. The present respondent no. 2 being aggrieved by the aforesaid Order filed Criminal Revision Application No. 27 of 2001 before the District and Sessions Judge, South Goa, Margao. The learned District and Sessions Judge by his Order dated 15th September 2001 allowed the aforesaid Criminal Revision Application filed by the respondent no. 2 and quashed and set aside the Order of the Executive Magistrate. The present revision has been filed by the applicant challenging the Judgment of the learned District and Sessions Judge in the aforesaid Criminal Revision.

4. In reply to the notice before admission issued by this Court, the learned Additional Advocate General Mr. Thali appearing for the respondent No. 1 State, has filed an affidavit of the Under Secretary, Home for the State of Goa. In the aforesaid affidavit it is stated that earlier no Executive Magistrate was empowered by the State to exercise powers under Section 133 of the Code of Criminal Procedure. By Notification dated 24th January 2002 the State has specially empowered all the Executive Magistrates to exercise

powers under Section 133 of the Code of Criminal Procedure. It is, therefore, stated that the Order of the learned Executive Magistrate suffers from the vice of absence of necessary jurisdiction to have decided the application under Section 133 of the Code of Criminal Procedure.

5. Mr. Lotlikar, the learned senior advocate appearing for the respondent no. 2, has urged before me that in view of the fact that the learned Executive Magistrate was not empowered to decide the application under Section 133 of the Code of Criminal Procedure, the Order passed by the learned Executive Magistrate is unenforceable.

6. After giving my anxious considerations to the rival submissions advanced before me, it is clear that the absence of necessary jurisdiction to have decided the aforesaid application of the applicant is an irregularity which vitiates the Order of the Executive Magistrate. In view of this, the Order of the Executive Magistrate, dated 15th March 2001, and the Judgment of the learned District and Sessions Judge, dated 15th September 2001 in Criminal Revision Application No. 27 of 2001 are quashed and set aside. It would be in the fitness of things that the application of the present applicant under Section 133 of the Code of Criminal Procedure is remanded to the learned Executive Magistrate for a decision afresh in

view of the fact that the learned Executive Magistrate has now been conferred the powers to decide the application under Section 133 of the Code of Criminal Procedure.

7. In the result Criminal Revision Application is allowed to the extent that the Order of the Executive Magistrate dated 15th March 2001, the Conditional Order dated 23rd September 1997 and the Judgment of the learned District and Sessions Judge, referred to above are quashed and set aside. The matter is remanded to the learned Executive Magistrate for decision afresh after giving an opportunity to the parties to lead evidence. In view of the fact that the applicant had filed the application under Section 133 of the Code of Criminal Procedure in the year 1997, the Executive Magistrate is directed to decide the aforesaid application expeditiously and in any case within 6 months from the receipt of the Order of this Court.

(P.V. HARDAS)
JUDGE.

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